Office-Supreme Court, U.S.
FILED
MAY 5 1966
JOHN F. DAVIS, CLERK

SUPREME COURT OF THE UNITED STATES

No. 1281

MICHAEL F. COSTELLO, EXECUTOR, *Petitioner*,

v.

ELIZABETH M. O'BRIEN, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS.

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Attorney for Petitioner.

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SUPREME COURT OF THE UNITED STATES

No.

MICHAEL F. COSTELLO, *Executor*,
PETITIONER

v.

ELIZABETH M. O'BRIEN,
RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

REFERENCES TO REPORTS OF OPINIONS

Your petitioner, Michael F. Costello, a citizen of the State of Rhode Island, residing in the City of Pawtucket in said State, individually and as executor of the will of Ellen M. Darcey, late of Seekonk, Massachusetts, deceased testate, respectfully refers this Honorable Court to:

a. The opinion of the Supreme Judicial Court of Massachusetts in the case of

Michael F. Costello v. *Kathryn E. Conlon et al*
344 Mass. 754, 182 NE2d 532

affirming the decree of the Probate Court of Bristol County Massachusetts, admitting the will and codicil of Ellen M. Darcey to probate and appointing your petitioner, Michael F. Costello, executor thereof.

b. The opinions of the Supreme Court of the State of Rhode Island and Providence Plantations in the cases of

Michael F. Costello, Executor v.
Probate Court of the City of Pawtucket
Elizabeth M. O'Brien v. *Michael F. Costello et al.*,—R. I.—204 A2d 307

c. The opinion of the Supreme Court of the State of Rhode Island and Providence Plantations in the case of

Elizabeth M. O'Brien v. *Michael F. Costello*,—R. I.—, 216 A2d 694

II.

JURISDICTION

This petition is brought to review the opinion of the Supreme Court of the State of Rhode Island and Providence Plantations entered on February 7, 1966 in Elizabeth M. O'Brien v. Michael F. Costello—R. I.—, 216 A2d 694 hereinabove in paragraph I. c. referred to, which overruled your petitioner's exception to a decision of the Rhode Island Superior Court denying your petitioner's motion to dismiss the appeal of Elizabeth M. O'Brien from the decree of the Probate Court of the City of Pawtucket, Rhode Island, to affirm said decree and to remand the case to said Probate Court for further proceedings.

Your petitioner invokes the jurisdiction of this Court on the ground that the decree of the Probate Court of Bristol County Massachusetts as finally affirmed on appeal by the Supreme Judicial Court of the Commonwealth is conclusive and binding in Rhode Island upon the respondent, Elizabeth M. O'Brien, under Article IV, Section 1 of the Constitution of the United States.

Your petitioner says that jurisdiction to review the opinion of the Supreme Court of the State of Rhode Island hereinabove in paragraph I. c. referred to is conferred on this Court by F. C. A. 28 § 1257 (3).

III.

QUESTION

Is the decree of the Probate Court of Bristol County Massachusetts, entered after a contest by one heir-at-law, admitting to probate two documents purporting to be a will and codicil thereto, as the last will and testament of Ellen M. Darcey, and appointing your petitioner executor thereof, as finally affirmed on appeal by that heir to the Supreme Judicial Court of the Commonwealth, res adjudicata, entitled to full faith and credit and conclusive in Rhode Island on another heir-at-law with respect to your petitioner's title and the questions of domicil,

factum of the will, testamentary capacity and undue influence, specifically adjudicated in Massachusetts, where the estate of the testatrix in Rhode Island consisted of accounts in Rhode Island banks, shares of stock and bonds the certificates or evidences of which are in a safe deposit box in a Rhode Island bank?

IV.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Article IV, Section 1
R. R. Gen. Laws 1956, Title 33, Chap. 7, Secs. 18, 19, 20, 21
R. I. Gen. Laws 1956, Title 33, Chap. 11, Sec. 5
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R. I. Gen. Laws 1956, Title 33, Chap. 23, Sec. 10.
7 Annotated Laws of Mass., Chap. 215, Secs. 1, 2, 9, 15, 46

V.

STATEMENT OF THE CASE

On October 26, 1960, Ellen M. Darcey, a resident of Seekonk, Massachusetts died in a nursing home in Attleboro, Massachusetts. She left an estate, the bulk of which consisted of securities in a safe deposit box in a branch of the Industrial National Bank of Rhode Island not far from the state line between Pawtucket, Rhode Island and Seekonk, Massachusetts and certain bank accounts in Rhode Island banks. She left no real estate or tangible personal property in Rhode Island. She did leave a parcel of real estate in Seekonk, Massachusetts.

On November 14, 1960, a will and codicil was filed in the Probate Court of Bristol County Massachusetts, together with a petition for probate of the same as the last will of said Ellen M. Darcey. Written notice was given by mail to all the heirs-at-law, including Kathryn E. Conlon and Elizabeth M. O'Brien, both of Providence, Rhode Island, nieces of the testatrix, and legatees under her will. William H. McSoley, Esq. of Providence, Rhode Island, with whom was associated Clarkin & Waldron, attorneys of Fall River, Massachusetts, entered their appearance in the Bristol County Probate Court for Kathryn E. Conlon and contested the will.

On January 13, 1961, Kathryn E. Conlon, by her attorneys, McSoley and Geary, filed in the Probate Court of the City of

Pawtucket, Rhode Island, a petition praying for her appointment as custodian in Rhode Island of the Estate of Ellen M. Darcey. On the same date she also filed a petition to be appointed administratrix of the Estate of Ellen M. Darcey "a non-resident of Rhode Island, who died on, to wit, October 26, 1960, domiciled in the Town of Seekonk, County of Bristol and Commonwealth of Massachusetts,". On February 15, 1961, Kathryn E. Conlon amended her petition for administration to recite that Ellen M. Darcey died a resident of the City of Pawtucket, Rhode Island. On February 20, 1961, said Kathryn E. Conlon filed a Bill in Equity in the Superior Court for the County of Providence, Rhode Island against your petitioner and others and procured a restraining order enjoining your petitioner from entering the safe deposit box hereinabove referred to and from removing any assets of the Estate of Ellen M. Darcey from the State of Rhode Island.

On March 28, 1961, the Probate Court for the County of Bristol, Massachusetts entered a decree admitting the will and codicil as the last will and testament of Ellen M. Darcey and appointing your petitioner, Michael F. Costello as executor thereof.

On April 17, 1961, Kathryn E. Conlon, by her attorneys, claimed an appeal from said last mentioned decree to the Supreme Judicial Court of the Commonwealth.

On May 3, 1962, the Supreme Judicial Court of the Commonwealth of Massachusetts affirmed the decree of the Probate Court of Bristol County, Massachusetts.

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344 Mass. 754, 182 NE2d 532

On May 21, 1962, Elizabeth M. O'Brien of Providence, Rhode Island, another niece of the testatrix and, like Kathryn E. Conlon, a substantial legatee under her will, by her attorney, William H. McSoley,[1] filed in the Providence County Superior

[1]The same William H. McSoley, Esq. who represented the appellant, Kathryn E. Conlon in Michael F. Costello v. Kathryn E. Conlon et al 344 Mass. 754, 182 NE2d 532 and who represented both Kathryn E. Conlon and Elizabeth M. O'Brien in the Superior Court equity suits hereinabove referred to. The will of Ellen M. Darcey contained an "in terrorem clause".

Court another Bill in Equity against your petitioner and others and also obtained an ex parte restraining order.

On June 15, 1962, Elizabeth M. O'Brien, by her attorneys, McSoley and Geary, also filed a petition in the Probate Court for administration on the Estate of Ellen M. Darcey.

On August 16, 1962 the cases of Conlon v. Costello and O'Brien v. Costello were heard together on the prayers contained in the bills for temporary injunctions. In the case of Conlon v. Costello, the prayer for a temporary injunction was denied and the restraining order vacated; but in the case of O'Brien v. Costello, by decree entered on the 18th day of August, A. D. 1962, the Superior Court granted a preliminary injunction enjoining Costello from entering the safe deposit box of the decedent and from transferring to Massachusetts any assets of the estate coming into his hands. Costello appealed from this decree to the Rhode Island Supreme Court. See Elizabeth M. O'Brien v. Michael F. Costello et al 204 A2d 307

On March 27, 1963, your petitioner, Michael F. Costello, filed in the probate Court of the City of Pawtucket, Rhode Island a petition to record the will and codicil of Ellen M. Darcey, together with the Massachusetts probate thereof, all duly authenticated according to the act of Congress. This petition was contested by Elizabeth M. O'Brien, by her attorneys, McSolely and Geary.

On December 19, 1963, at the conclusion of the contestant's case, counsel for your petitioner moved that the Court forthwith order the authenticated copy of the will and probate in Massachusetts be recorded in Rhode Island upon the ground that "at the hearing, no sufficient cause is shown to the contrary,".

R. I. General Laws 1956, Sec. 33-7-20

On May 6, 1964, the Pawtucket Probate Court, in the presence of counsel for both sides, entered a decree ordering the authenticated copy of the will of Ellen M. Darcey and the Massachusetts probate thereof to be filed and recorded in Rhode Island and appointed your petitioner, Michael F. Costello, as executor in Rhode Island.

On the same date, the Probate Court entered decrees denying the petitions of Kathryn E. Conlon and Elizabeth M.

O'Brien for administration on the Estate of Ellen M. Darcey.

On the same Date, William H. McSolely, Esq., on behalf of the contestant, Elizabeth M. O'Brien, appealed to the Rhode Island Superior Court from the decrees of the Probate Court denying her petition for administration and ordering the filing and recording in Rhode Island of the will of Ellen M. Darcey and the Massachusetts probate thereof. No appeal was taken from the decree of the Probate Court denying the petition of Kathryn E. Conlon for administration.

The Reason of Appeal from the decree of the Pawtucket Probate Court ordering the filing and recording in Rhode Island of the will of Ellen M. Darcey and the Massachusetts probate thereof purport to raise substantially the following questions:

1. Domicil of the testatrix, Ellen M. Darcey.
2. The factum of the will of Ellen M. Darcey.
3. Testamentary capacity of Ellen M. Darcey.
4. Whether or not the will of Ellen M. Darcey was procured by undue influence.

Counsel for Elizabeth M. O'Brien moved in the Superior Court to consolidate her appeals and assign them to the jury trial calendar for trial. Counsel for your petitioner, Michael F. Costello, objected to the motion to consolidate and assign to the jury trial calendar upon the ground that O'Brien's Reasons of Appeal raised no material question of fact which had not been finally determined in Massachusetts in Costello v. Conlon et al 344 Mass. 754, 182 NE2d 532 which your petitioner contended was entitled to full faith and credit and binding on the appellant O'Brien in these Rhode Island proceedings. Counsel for your petitioner then moved to dismiss the appeals, affirm the decrees and remand the case to the Pawtucket, Rhode Island Probate Court for further proceedings.

Your petitioner's motion to dismiss and remand O'Brien's appeal from the decree of the Probate Court ordering the filing and recording in Rhode Island of the will of Ellen M. Darcey and the Massachusetts probate thereof was denied by a justice of the Superior Court and from this decision your petitioner prosecuted a Bill of Exceptions to the Supreme Court of Rhode

Island. It is to review the opinion of the Rhode Island Supreme Court on this appeal (ante I. c. p. 2 hereof) that this petition is brought.

O'Brien's petition for administration and motions pending thereunder were continued nisi until a final determination of this appeal and the motion to assign to the jury claendar was denied without prejudice.

Thereafter, on April 1, 1966 O'Brien's motion to assign the case to the Jury Trial Calendar in the Superior Court on October 31, 1966 was granted by a justice of the Superior Court.

A motion to stay further proceedings in the case until this Petition for Certiorari is disposed of has been filed in the Rhode Island Supreme Court.

VI.

ARGUMENT

THE JUDGMENT OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS IN COSTELLO V. CONLON ET AL, 344 MASS. 754 IS RES ADJUDICATA, ENTITLED TO FULL FAITH AND CREDIT AND CONCLUSIVE ON ELIZABETH M. O'BRIEN IN THE RHODE ISLAND PROCEEDINGS WITH RESPECT TO YOUR PETITIONER'S TITLE AND THE ISSUES OF DOMICIL, FACTUM OF THE WILL, TESTAMENTARY CAPACITY AND UNDUE INFLUENCE.

> 1. "The law vests title to *all* personal property of a decedent in his executor or administrator, and requires the latter to notify 'all the world,' by publication, of his assumption of the office,—a proceeding constituting the notice, monition, or proclamation required to obtain jurisdiction in rem."

1 Woerner, The Am. Law of Administration, 3rd Ed., Sec. 148
Brigham v. *Fayerweather* 140 Mass. 411
Bullen v. *Wisconsin* 240 U S 625, 631
Tilt v. *Kelsey* 207 U S 43, 52

Whatever rule may be applicable to real estate and *tangible* personal property, it is the position of your petitioner in this case that title to all the *intangible* personal property

Cf. *Blackstone* v. *Miller* 188 U S 189
Bullen v. *Wisconsin* 240 U S 625
Frick v. *Pennsylvania* 268 U S 473

of the testatrix, wherever located, *vested in her executor* under her will, which was finally admitted to probate in Massachusetts and that title is valid in Rhode Island, subject to the rights of creditors[1] under *General Laws 1956, Sections 33-18-25, 26.*

[2]*Lapham* v. *Olney* 5 R. I. 413
Bullard v. *Redwood Library* 37 R. I. 107, 111
Pickering v. *Pickering* 64 R. I. 112

In Pickering v. Pickering, supra, the Rhode Island Supreme Court said:

> "It is clear that at common law a will of personal property is governed by the law of the testator's domicile at the time of his death."
>
> *Pickering* v. *Pickering* 64 R. I. 112, 117

This is in strict accord with the maxim, "mobilia personam sequuntur, immobilia situm".

If, therefore, the domicil of the decedent, Ellen M. Darcey, at the time of her death was in the Commonwealth of Massasetts, her intangible personal property at least, by the traditions of our law "is regarded as a universitas the succession to which is incident to the succession to the persona of the deceased."

Bullen v *Wisconsin, supra*

2. But the domicil of the deceased at the time of her death was in the Commonwealth of Massachusetts.

The Supreme Judicial Court of Massachusetts held that Ellen M. Darcey was domiciled in Massachusetts at the time of her death"

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[1]There are no Rhode Island creditors and the time for filing claims under R. I. Gen. Laws 1956, 33-11-5 has expired.

[2]The validity of a will of real estate is governed by the law of the situs. Bowen v. Johnson 5 R. I. 112. The question as to whether or not a foreign will is valid as to personalty in Rhode Island was left open in Olney v. Angell 5 R. I. 198 but this question was settled in Lapham v. Olney, supra.

> *"The evidence, . . ., amply supports the conclusions that the decedent had her domicil in Massachusetts at her death . . . and that she had testamentary capacity . . . A finding was justified that there was no undue influence. . . ."*
>
> *Costello* v. *Conlon et al* 344 Mass. 754

3. The findings of fact of the Supreme Judicial Court of Massachusetts in Costello v. Conlon, supra, are res adjudicata, entitled to full faith and credit and binding in the Rhode Island proceedings.

Your petitioner concedes that the adjudication of the question of domicil by one state is not conclusive on that question in another state nor even evidence of it in a *collateral* proceeding.

> *Thormann* v. *Frame* 176 U S 350
> *Overby* v. *Gordon* 177 U S 214
> *Tilt* v. *Kelsey* 207 U S 43
> *Baker* v. *Baker, Eccles & Co.* 242 U S 394
> *Hanson* v. *Denckla* 357 U S 235
> *Riley* v. *New York Trust Co.* 315 U S 343

In tilt v. Kelsey, supra, this Court quoted with approval an opinion of Mr. Justice Holmes:

> "We may lay on one side, then, any argument based on the misleading expression that all the world are parties to a proceeding in rem. This does not mean that all the world are entitled to be heard, and as strangers in interest are not entitled to be heard, there is no reason why they should be bound by the findings of fact, although bound to admit the title or status which the judgment establishes."
>
> *Brigham* v. *Fayerweather* 140 Mass. 411

(1) Elizabeth M. O'Brien is not a stranger in interest with respect to the probate proceedings in Massachusetts.

She had the same direct interest in the subject matter of the Massachusetts proceedings as her cousin, Kathryn E. Conlon. Like her cousin, Kathryn E. Conlon, she was an heir-at-law and legatee under the will. Her interest as such would be affected by the judgment in the Massachusetts proceedings.

She had the same right as her cousin to contest, examine witnesses and appeal[1] from the decision of the probate court. She had the same notice of the pendency of the Massachusetts proceedings as her cousin; but she neglected or refused to appear and avail herself of her rights. She is, therefore, concluded by the Massachusetts judgment.

34 C. J. Judgments, Sec. 1410

(2) The will in the instant case was not admitted to probate in Massachusetts in ex parte proceedings.

Notice to the heirs-at-law and legatees was not merely "contructive" but actual written notice. Both Kathryn E. Conlon and Elizabeth M. O'Brien were served with a citation by registered mail under

7 Ann. Laws of Mass., Chap. 215, Sec. 46

The opinion of the Rhode Island Supreme Court in O'Brien v. Costello 216 A2d 694, concedes that

> "O'Brien was served with a notice of pending probate hearing mailed to her in Rhode Island,".

It should be borne in mind that Massachusetts probate courts are courts of record.

7 Ann. Laws of Mass., Chap. 215, Sec. 1

They are courts of superior and general jurisdiction.

7 Ann. Laws of Mass., Chap. 215, Sec. 2

However, while Kathryn E. Conlon appeared and contested the probate proceedings in Massachusetts and appealed from the decree of the probate court adverse to her to the Supreme Judicial Court of the Commonwealth, Elizabeth M. O'Brien, probably because of the in terrorem clause in the will, did not enter an appearance in the Massachusetts proceedings but awaited the outcome thereof and now seeks to contest the will all over again in Rhode Island on precisely the same grounds and with the same attorney as her cousin did and had in Massachusetts. It is submitted that O'Brien was in privity with her cousin, Conlon.

65 Harvard Law Review 855, 856

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[1]Even though she did not enter an appearance in the probate court. Ann. Laws of Mass. C. 215, Secs. 9, 15; Schneider v. Harrington 320 Mass. 723.

O'Brien was, therefore, a party bound by the decision in Costello v. Conlon.

(3) Your petitioner submits, therefore, that we have in the instant case a situation where the Rhode Island Supreme Court disregarded the adjudication of the Commonwealth of Massachusetts on the issues of domicil, factum of the will, testamentary capacity and undue influence which had been squarely litigated in a truly adversary proceeding in Massachusetts.

> *"One trial of an issue is enough. 'The principles of res judicata apply to questions of jurisdiction as well as to other issues'*, as well to jurisdiction of the subject matter as of the parties."
>
> *Treinies* v. *Sunshine Mining Co.* 308 U. S. 66

This Court has recently held (December 2, 1963) as follows:

> "However, while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions ofthis Court have carefully delineated the permissible scope of such an inquiry. From these decisions there emerges the *general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment.*
>
> *Duefee* v. *Duke* 375 U S 106, 11 L ed 2d 191, 84 S Ct 242

It is true that in Durfee v. Duke the controversy in Missouri was between the identical parties who litigated the question of title in Nebraska. But your petitioner contends that O'Brien is a party concluded by the in rem probate proceedings in Massachusetts and that the judgment of the Supreme Judicial Court of Massachusetts is entitled to full faith and credit in Rhode Island under the circumstances of this case on all questions of fact fully litigated and finally decided in that Commonwealth.

Lapham v. *Olney* 5 R. I. 413
Loring v. *Arnold* 15 R. I. 428, 430
Crippin v. *Dexter* 13 Gray 330
Brigham v. *Fayerweather* 140 Mass. 411, 5 N. E. 265
Morrison v. *Hass* 229 Mass. 514, 118 N. E. 893
Thomas v. *Morrisett* 76 Georgia 384
Kurtz v. *Stenger* 169 Md. 544, 812 A. 456

In Re Balch (1916) 93 Misc. 419, 156 N. Y. S. 1006 affirmed without opinion in (1916) 175 App. Div. 933, 161 N. Y. S. 1117

Your petitioner submits that one heir-at-law, who had actual notice in accordance with the Massachusetts statute, ought not to be permitted to sit back, allow all questions, including that of jurisdiction, to be litigated in Massachusetts by another heir, and then start the whole thing all over again in Rhode Island.

(4) The authenticated copy of the will of Ellen M. Darcey and the Massachusetts probate thereof was not introduced as evidence in the Rhode Island proceedings on a collateral issue, e.g. estate taxes, rights of creditors, etc. The issues raised by Elizabeth M. O'Brien's Reasons of Appeal to the Rhode Island Superior Court from the Probate Court directly involve the validity of the probate of the will of Ellen M. Darcey and the granting of letters testamentary to your petitioner in Massachusetts.

This distinction is mentioned in the decision of Holmes J., in

Brigham v. *Fayerweather* (1886) 140 Mass. 411 at p. 415

The cases relied on by the Rhode Island Supreme Court in O'Brien v. Costello are clearly distinguishable on their facts from the instant case.

For example, the Court cites Baker v. Baker, Eccles & Co. 242 U S 394. The decision in that case turned principally upon the ex parte nature of the proceedings for the appointment of an administrator. It is to be noted also in that case that the question was one affecting the devolution of the property of which the decedent died intestate.

In Overby v. Gordon 177 U S 214, it appeared that after the commencement of proceedings in the District of Columbia,

certain persons who had filed a caveat therein, procured in *ex parte* proceedings the appointment of an administrator in Georgia. The District of Columbia was held not bound by the Georgia courts' finding of residence in that state.

Hanson v. Denckla 357 U S 235 was an attempt to subject to the probate proceedings in one state the corpus of an inter vivos trust in another state. The trustee was obviously not entitled to be heard in the probate proceedings in the first state.

The Rhode Island Supreme Court relies strongly on Riley v. New York Trust Co. 315 U S 343. That case had to do with the rights of creditors and the right of the second state to tax assets considered within that state by statute and the second state was not held bound by the adjudication of domicil by the state of probate. In the Riley case, this Court said (at p. 354):

> "It seems quite obvious that the administrator c. t. a. appears in Delaware as an *agency of the State of New York*, and not as the alter ego of the beneficiaries of the Hungerford estate. In its answer to the petitioners' statement of claim, it established its status by alleging that not merely the beneficiaries but *creditors* residing in New York and the State of New York were interested in the estate, that its appointment as temporary administrator *had been sought by the New York Tax Commissioner* 'to protect the claim of the State of New York to inheritance and succession taxes,' that the State of New York was asserting such claims in substantial amount on the theory that the domicile was New York, and that, under New York law, as evidenced by statutes likewise pleaded, an administrator was 'vested by law with the right to possession and control over and to exercise all manner of dominion over all of the goods and chattels and personal property of every kind and description of the estate of a decedent.'" (Emphasis supplied)

In a concuring opinion in which Justices Frankfurter and Jackson joined, Mr. Chief Justice Stone said:

> "I concur upon the single ground that the

> New York administrator was not bound by the Georgia judgment. He was not a party to the Georgia proceedings, nor was he represented by any of those who were parties. .....
> Any other conclusion would foreclose New York from litigating its right to collect taxes lawfully due, by the simple expedient of a probate by the next of kin of the will of the decedent as the domiciled resident of another state, without notice to any representative of New York or opportunity to be heard."

In the instant case your petitioner, the duly qualified executor in Massachusetts under the will of Ellen M. Darcey, presented to the Probate Court of the City of Pawtucket, Rhode Island a duly authenticated copy of the will and the Massachusetts probate thereof and requested that it "be filed and recorded in the office of the probate Clerk" of said Pawtucket under

General Laws 1956, Sec. 33-7-18

There never were any Rhode Island creditors involved (see ante footnote p. 11), nor is this a proceeding directly or indirectly by the State of Rhode Island to collect inheritance or other taxes. In any event, when your petitioner was appointed executor in Rhode Island by the Pawtucket Probate Court, he would be obliged under Rhode Island law to pay all taxes due and all claim of creditors filed.

Dolan v. *Anthony* 51 R. I. 181

Furthermore, it is significant in Riley v. New York Trust Co. that the New York administrator was an administrator c. t. a. which appears to indicate that the will was not proved all over again in the State of New York.

(5) The Rhode Island statutes provide for the recording and filing of a foreign will and probate. They plainly indicate that, at least under the circumstances of this case, the questions of fact litigated in another state should not be relitigated again in Rhode Island.

> "33-7-18. Request to record foreign probated will.—Whenever the executor or any other person interested in any will, which has been *finally*

proved and allowed in a probate court in any other of the United States, in any territory or district thereof, or in a probate court in any foreign country, shall produce a copy of such will and of the probate thereof, duly authenticated according to the act of congress, to any probate court in any town or city in this state where the testator had estate, real or personal, whereon the will may operate, and shall in writing request that the will may be *filed and recorded* in the office of the probate clerk in such town or city, the court shall assign a time and place for a hearing thereon." (Emphasis Supplied)

G. L. 1956, Sec. 33-7-18

It is to be noted that this section uses the words "finally *proved*" with respect to the probate in another state; but with respect to Rhode Island it uses the words "*filed and recorded*". It does not require that the will should be again "finally *proved*" in Rhode Island.

The next section reads as follows:

"33-7-19. Notice of offer of foreign will.—Upon such request, the court shall cause notice thereof to be given in the same manner *as if* said will was presented to such court for probate, to the end that any person may appear and show cause why said copy should not be filed and recorded." (Emphasis Supplied)

G. L. 1956, Sec. 33-7-19

Section 33-7-19 was quoted in O'Brien v. Costello 216 A2d 694 and the court italicized the last clause of the section. Your petitioner submits that if anything is to be italicized in that section it should be the words "as if." The statute requires the same notice "*as if*" the will was presented to the Rhode Island court for probate which it is not but only for *record and filing*.

This becomes even clearer when read in conjunction with the next two succeeding sections:

"33-7-20. Order approving foreign will—Effect on real estate titles.—If, at the hearing, *no*

sufficient cause is shown to the contrary, the court may order said copy to be *placed on file and recorded* . . . and provided, further, that when any such copy is duly filed and recorded as aforesaid, title to lands devised by the will shall relate back to the death of the testator." (Emphasis Supplied)

G. L. 1956, Sec. 33-7-20

"33-7-21. Effect of recording of foreign will —Granting of letters.—Whenever a copy of any will which has been *finally proved and allowed* in any probate court in any other of the United States, in any territory or district thereof or in any foreign country, shall be *finally ordered to be filed and recorded* in a probate court in this state pursuant to §§ 33-7-18 to 33-7-20, inclusive, the filing and recording thereof shall be of the same force and effect *as if* the will had been *originally proved and allowed* in this state, subject to the provisos in § 33-7-20; and the probate court in which the copy of said foreign will is ordered to be filed and recorded may grant letters testamentary to the executor therein named, or letters of administration with the will annexed to such person as the court may deem fit, taking bond from such executor or person *as in case* of a will *proved and allowed* in such probate court." (Emphasis Supplied)

G. L. 1956, Sec. 33-7-21

Your petitioner contends that under these statutes Elizabeth M. O'Brien could "show cause why said copy should not be filed and recorded" in Rhode Island only by showing, for example, that the will of Ellen M. Darcey had not been finally "proved and allowed" in Massachusetts or that the copy was not "authenticated according to the act of congress," etc. She could not relitigate the questions of domicil, factum of the will, testamentary capacity and undue influence.

The Rhode Island statutes recognize the validity of the status and title of your petitioner as established by the final probate of the will of Ellen M. Darcey in Massachusetts.

Rhode Island General Laws 1956, Secs. 33-18-24, 25

It is only creditors who can object to your petitioner's title and right to possession of assets in Rhode Island.

Rhode Island General Laws 1956, Sec. 33-18-26

See Connor v. N. Y. N. H. & H. R. R. Co. 28 R. I. 560, 564-565

Morrison v. Hass (1918) 229 Mass. 514

It is further submitted, therefore, in

VII

CONCLUSION

1. The judgment of the Supreme Judicial Court of Massachusetts in Costello v. Conlon et al 344 Mass. 754 is res asjudicata, entitled to full faith and credit and conclusive on Elizabeth M. O'Brien in the Rhode Island proceedings with respect to your petitioner's status and title and the issues of domicil, factum of the will testamentary capacity and undue influence.

2. The judgment of the Supreme Court of the State of Rhode Island in Elizabeth M. O'Brien v. Michael F. Costello—R. I.—216 A2d 694 erroneously denies full faith and credit to the judgment of the Supreme Judicial Court of Massachusetts in Costello v. Conlon et al 344 Mass. 754 and, therefore, violates Article IV, Section 1 of the Constitution of the United States.

3. The Superior Court of the State of Rhode Island erroneously denied your petitioner's motion to dismiss the appeal of Elizabeth M. O'Brien from the decision of the Pawtucket Probate Court and the Supreme Court of the State of Rhode Island was in error in overruling your petitioner's exception to the decision of the Superior Court in that respect.

4. THE PETITION FOR A WRIT OF CERTIORARI SHOULD, THEREFORE, BE GRANTED.

F.C.A., Title 28, Sec. 1257 (3)

Tilt v. *Kelsey* 207 U S 43

Hartford Life Insurance Co. v. *Ibs* 237 U S 662
Bates v. *Bodie* 245 U S 520

Respectfully submitted,

.....

FRANCIS R. FOLEY
255 Main Street
Pawtucket, Rhode Island
Attorney for Petitioner

APPENDIX

CONSTITUTIONAL PROVISION INVOLVED

§. 1. Full faith and credit.—Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.

U. S. Constitution, Article IV, Sec. 1

RHODE ISLAND STATUTES INVOLVED

33-7-18 See ante p. 21

33-7-19 See ante p. 22

33-7-20 See ante p. 23

33-7-21 See ante p. 23

33-11-5. Time allowed for filing claims—Petition to allow late filing—Appeal.—Claims shall be filed within six (6) months from the said first publication. Claims not filed within six (6) months from said publication shall be barred; provided, that a creditor who, by reason of accident, mistake or any other cause, has failed to file his claim, may, at any time, before the distribution of the estate, petition the probate court for leave to file his claim, and the probate court, after notice to the executor or administrator of the estate and a hearing on said petition, may in its discretion, grant leave to file such claim upon such terms, if any, as said court shall prescribe, which claim, if allowed, shall be paid out of the assets remaining in the hands of the executor or administrator at the time of the receipt by him of notice of the pendency of such a petition, and there shall be no appeal from an order or decree granting leave to file such claim. From an order or decree denying leave to file such claim an appeal may only be taken to the superior court where it shall be heard de novo and without a jury and neither the rulings of the superior court nor its order or decree shall be reviewable by an appeal or bill of exception.

R. I. Gen. Laws 1956, Title 33, Chap. 11, Sec. 5

33-18-24. Transfer of corporate securities and mortgages by foreign fiduciary.—Any corporation organized under the laws of this state may, before having actual notice of the pendency of an application in this state for letters testamentary, of administration, or guardianship, permit the executor of the will or administrator of the estate of a decedent who at the time of his decease was not a resident in this state, or a guardian whose ward does not reside in this state, duly appointed, qualified, and thereto authorized under the laws of any other state, territory, or district of the United States, to transfer to any person shares of stock and registered bonds standing in the name of such decedent or ward and to receive the dividends and interest thereon. The executor of the will or administrator of the estate of a decedent who at the time of his decease was not a resident in this state, or a guardian whose ward does not reside in this state, duly appointed and qualified under the laws of any other state, territory, or district of the United States shall have power to and may assign and transfer any mortgage debt, note and mortgage, held by or belonging to such decedent or to such ward, upon any real estate or personal property located in this state, provided a duly authenticated copy of the certificate of the appointment of such executor, administrator or guardian and evidence that such appointment has not been revoked are annexed to such assignment and transfer.

R. I. Gen. Laws 1956, Title 33, Chap. 18, Sec. 24

33-18-25. Payment of debt or delivery of property to foreign fiduciary.—Any person or corporation in this state, before having actual notice of the pendency of an application in this state for letters testamentary, of administration, or guardianship, may pay any money owing or deliver any personal property belonging to the estate of any decedent whose residence at the time of his decease was not in this state, or belonging to any person under guardianship whose residence is not in this state, to the executor or administrator of such decedent or to the guardian of such ward duly appointed, qualified, and authorized to receive the same under the laws of any other state, territory or district of the United States; and the receipt for payment or delivery to such executor, administrator or guardian shall be a valid discharge for such moneys and personal property.

R. I. Gen. Laws 1956, Title 33, Chap. 18, Sec. 25

33-18-26. Action by foreign executor or administrator—Prerequisites.—If a corporation refuse to permit a transfer as provided in § 33-18-24 or a person indebted refuse to pay, or having possession refuse to deliver personal property as permitted in § 33-18-25, such executor or administrator, if there is no executor or administrator appointed in this state, upon application to the probate court of any town in this state in which any real estate of said decedent is located, or, if there is no such real estate, in which any personal property of such decedent is situate, or in which any debtor resides, or in which any corporation whereof the decedent owned shares of stock or registered bonds is located, may be authorized by such court to transfer such shares and bonds or to take possession of such personal property and collect such debts, and such executor or administrator may demand, due for, and recover the same; provided, that no foreign executor or administrator shall be so authorized to make any transfer or take possession of personal property under the provisions of this section until he shall have filed in such court a copy of the will, if any, and of his appointment, authenticated as aforesaid, nor until six (6) months after his appointment, nor until he shall have given bond to the probate court appointing him, unless sufficient bond has been given, nor until he shall have advertised notice of his application in this state at least once each week for two (2) successive weeks in some newspaper, as directed by said probate court; and provided, further, that no such authority to transfer or take possession shall be granted, if any creditor of such deceased person or ward shall show to the probate court valid objections hereto, supported by a sworn statement of his claim or demand and that the same is justly due.

R. I. Gen. Laws 1956, Title 33, Chap. 18, Sec. 26

33-23-10. Claim for jury trial.—If a matter of fact be in controversy, either party may, at any time before the assignment day claim a jury trial, by notice in writing filed with the clerk of the superior court.

R. I. Gen. Laws 1956, Title 33, Chap. 23, Sec. 10

MASSACHUSETTS STATUTES INVOLVED

s. 1. Courts of Record, etc.

Probate courts shall be courts of record, and the judge and the register of probate and insolvency for each county shall be, respectively, the judge and the register of the probate court of such county.

7 Annotated Laws of Mass., Chap. 215, Sec. 1

s 2. Superior Jurisdiction.

Probate courts shall be courts of superior and general jurisdiction with reference to all cases and matters in which they have jurisdiction, and no order, decree, sentence, warrant, writ or process made, issued or pronounced by them need set out any adjudication or circumstances with greater particularity than would be required in other courts of superior and general jurisdiction, and the like presumption shall be made in favor of proceedings of the probate courts as would be made in favor of proceedings of other courts of superior and general jurisdiction.

7 Annotated Laws of Mass., Chap. 215, Sec. 2

s 9. Person aggrieved May Appeal to Supreme Judicial Court.

A person aggrieved by an order, decree or denial of a probate court made after this chapter takes effect, may, within twenty days after the entry thereof, appeal from the same to the supreme judicial court, and the appeal shall be heard and determined by the full court, which shall have like powers and authority in respect thereto as upon an appeal in a suit in equity under the general equity jurisdiction.

7 Annotated Laws of Mass., Chap. 215, Sec. 9

s 15. Petition for Late Appeal.

A person who has, by accident or mistake, omitted to claim an appeal from a final decree within the time prescribed therefor may, within one year after the entry of the decree from which he desires to appeal, petition the full court for leave to appeal, which may be granted upon terms.

7 Annotated Laws of Mass., Chap. 215, Sec. 15

s 46. Service of Citation by Registered Mail.

When personal service is required of any citation issued by a probate court, the court may direct such service to be made by registered mail addressed to the party entitled thereto at his post office address. Further service may be ordered.

7 Annotated Laws of Mass., Chap. 215, Sec. 46

MICHAEL F. COSTELLO

v.

KATHRYN E. CONLON et al.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRISTOL.

Argued April 6, 1962.

Decided May 3, 1962.

Will contest. The Probate Court, Considine, J., entered a decree allowing will and codicil, and contestant appealed. The Supreme Judicial Court held that evidence sustained findings that decedent had her domicile in the state at her death, when nearly 94, that she had testamentary capacity when will and codicil were executed, and that there was no undue influence by an attorney who was named executor and bequeathed about $16,000 from an estate of about $114,000.

Decree affirmed.

(Head notes omitted)

William H. McSoley, Jr., Providence, R. I. (Quentin J. Geary, Providence, R. I., with him), for contestant.

Richard K. Martin, Taunton, for proponent.

Before WILKINS, C. J., and WHITTEMORE, CUTTER, KIRK and SPIEGEL, JJ.

RESCRIPT.

(1-3) The contestant appeals from a decree allowing a will and one codicil, in which Mr. Costello, the decedent's Rhode Island lawyer, was named as executor. There is no report of material facts. The evidence, which is reported, amply supports the conclusions that the decedent had her domicil in Massachusetts at her death on October 26, 1960, when nearly 94, and that she had testamentary capacity in 1957 when the will and codicil were executed. One witness to the codicil had moved to Connecticut and was in poor health. Her testimoney

was not essential. See Finer v. Steuer, 255 Mass. 611, 616, 152 N.E. 220; Goodwin v. Riordan, 333 Mass. 317, 318, 130 N.E. 2d 569. A finding was justified that there was no undue influence by Mr. Costello, who was bequeated about $16,000 from an estate of about $114,000. He did not draw the will and codicil and was not shown to have been present when they were signed or discussed. The judge did not order, as requested by the contestant's attorney, the production by Mr. Costello of certain documents which he had delivered to his counsel. The examination by the contestant's attorney of most of the witnesses, including Mr. Costello, was repetitious and unduly prolonged. After a number of warnings about repetition of inquiry and the need of more relevant questions, the judge cut off this attorney's examination of Mr. Costello. In the absence of indication of unexplored relevant areas about which the attorney wished to make inquiry, and where the attorney had not taken advantage of all usual opportunities for examination of Mr. Costello and of his counsel with respect to the documents, we cannot say that the judge abused his discretion in restricting the examination as he did.

Decree affirmed.

344 Mass. 754
182 N.E. 2d 532.

Supreme Court

Michael F. Costello, Ex'r v. Probate Court of the City of Pawtucket.	M. P. No. 1642.
Elizabeth M. O'Brien v. Michael F. Costello et al.	Equity No. 3054.

OPINION

JOSLIN, J. These cases were heard together. The first case, Costello v. Probate Court, is a petition for certiorari to review the action of the probate court of the city of Pawtucket wherein it ordered that an authenticated copy of the will and codicil of Ellen M. Darcey, deceased, as finally proved and allowed in Massachusetts, be filed and recorded and that letters testamentary be issued to Michael F. Costello.

The second case, O'Brien v. Costello, is an appeal from a decree of the superior court granting a temporary injunction after a hearing by a justice of that court upon the complainant's sworn bill. Neither party presented any evidence. Of the four respondents named in the bill of complaint, only two filed reasons of appeal and only the respondent Costello either briefed or argued his contentions and our decision is limited to his appeal.

We shall hereinafter refer to the first case as "the certiorari proceedings," to the second case as "the equity cause," to Michael F. Costello as "Costello," and to Elizabeth M. O'Brien as "O'Brien."

We consider first the certiorari proceedings wherein we issued the writ on the strength of Costello's allegations that the probate court acted illegally in fixing the amount of his bond at $200,000 with surety, in ordering that the bond be conditioned on the assets of the estate remaining "in Rhode Island until such time as this matter has been fully litigated to whatever court it ultimately goes," and in appointing three appraisers. Costello further represented that certiorari was the only adequate remedy by which those illegalities could be

corrected. Pursuant to the writ, the pertinent records have been certified to this court.

The initial question is whether certiorari is the appropriate vehicle for reviewing the alleged errors. If it is not, we do not reach the issues of whether the actions of the probate court were without or in excess of its jurisdiction. Preliminarily we must determine whether some other adequate procedure was available for review of the claimed errors.

Since the enactment in 1905 of sec. 796 of the court and practice act, now G. L. 1956, §33-23-1, this court has held that under our practice, in the absence of some contrary provision, the superior court has exclusive and original jurisdiction on appeals from orders and decrees of the probate court. *MacKenzie & Shea v. R. I. Hospital Trust Co.*, 45 R. I. 407, 413. This is the procedure followed where the appealing party has been an executor or administrator.

Thus, in *Rhode Island Hospital Trust Co. v. Hopkins*, 38 R. I. 59, it was from a decree fixing an allowance out of the decedent's estate of a sum for the support of the testator's family; in *Kenyon v. Hart*, 38 R. I. 524, it was from a decree removing an administrator of an estate; and in *Hall v. Burgess*, 40 R. I. 314, it was from a decree denying permission to provide perpetual care for the decendent's grave.

On these authorities we conclude that Costello was an aggrieved person who in these circumstances could have appealed to the superior court, there had a hearing de novo, and then could have final review in this court by a bill of exceptions. That Costello may have neglected to claim and thereby lost the statutory right to claim an appeal to the superior court does not open the door to him for review by certorari for the writ is not a substitute for an appeal lost by lapse of time. *Cohen v. Superior Court*, 39 R. I. 272.

Having concluded that Costello had anotherad equate remedy for review of the alleged illegal actions of the probate court, certiorari is unavailable unless there are unusual or exceptional circumstances. This is the rule laid down in *Hyde v. Superior Court*, 28 R. I. 204, and reaffirmed many times since and as recently as the last term of court in *Rogers v. Rogers*, R. I. , 201 A. 2d 140.

Such unusual or exceptional circumstances are found, Costello argues, in the proliferation of pending legal proceedings affecting the Darcey estate, a condition which he contends will occasion great delay and expense in the settlement thereof, and will interfere with its orderly administration.

That litigation in addition to the certiorari proceedings and the equity cause includes the following causes all pending in the superior court: the probate appeal by O'Brien from the decree here reviewed; the appeals from decrees of the probate court denying the respective petitions of O'Brien and Kathryn E. Conlon, both nieces, next of kin and heirs-at-law of the decedent, for administration on her estate; and the equity suit of Kathryn E. Conlon, individually and as custodian of the Estate of Ellen M. Darcey, deceased v. Michael F. Costello et al., in which the issues raised and the relief sought are substantially the same as in the equity cause.

Costello asks us to decide that Ellen Darcey died a domiciliary of Massachusetts. This, he argues, will result in a termination of all pending litigation. In his petition, however, he asks only that we quash such portion of the record of the probate court as relates to the executor's bond and the appointment of appraisers. It is his statement of alleged errors which prescribes the limit of our review on certiorari absent an unusual situation involving the public interest. *Brown v. Waldman*, 93 R. I. 489, 177 A.2d 179. Such a situation we found to exist in *Rice ex rel. Perry v. Town Council*, 35 R. I. 117, where objections made to ballots cast in a municipal election were considered notwithstanding that they were not set forth as errors in the petition. The instant case, however, is not so affected with the public interest.

Limited as we are on certiorari to a review of the specific errors alleged, the question of the state of decedent's domicile at her death is not before us. Such being the case we fail to see how a determination by us of the alleged illegalities enumerated in the petition will result in a more speedy conclusion of the pending litigation than would otherwise be possible. We conclude, therefore, that there are no unusual or exceptional circumstances which here warrant a departure from the rule that certiorari will not lie where another adequate remedy for review is available.

We come now to the equity cause. There the superior court enjoined Costello from removing from this state any assets of the decedent's estate. The relief sought and granted was premised on the neglect in this state to probate the decedent's estate and to have a legal representative thereof appointed, conditions which it is alleged in the bill might result in the removal of estate assets from the jurisdiction of our courts with resultant irreparable harm to O'Brien. In the interval between the hearings in the superior court and this court, however, the probate court ordered, pursuant to G. L. 1956, §§33-7-18 to 33-7-21 inclusive, that a duly authenticated copy of the decedent's will as proved and allowed in Massachusetts be filed and recorded in this state and that letters testamentary be issued to Costello.

The basis upon which the injunction was predicated no longer existing, the question of whether prior to the probate of a foreign will and the appointment of a legal representative, a distributee or an heir-at-law may restrain the removal from this state of the assets of a decedent's estate is moot and will not be answered by us. *Kimball v. Pelosi*, R. I. , 192 A.2d 267, 269. This does not mean, however, that the superior court cannot and should not dissolve the injunction.

In the case of Michael F. Costello, Ex'r v. Probate Court of the City of Pawtucket, the petition for certiorari is denied and dismissed, the writ heretofore issued appearing from the return to have been improvidently issued is quashed, and the records certified are ordered returned to the respondent probate court with our decision endorsed thereon.

In the case of Elizabeth M. O'Brien v. Michael F. Costello et al., the appeal is denied and dismissed, the decree appealed from is affirmed, and the cause is remanded to the superior court for further proceedings. Our action, however, is without prejudice to the right of the respondent Costello to pursue such action in the superior court for a dissolution of the injunction as he may be advised.

R. I.—204 A2d 307

Supreme Court

Elizabeth M. O'Brien
v.
Michael F. Costello.

Ex. &c. No. 10,741.

OPINION

PAOLINO, J. This is an appeal from a decree of the probate court of the city of Pawtucket. The cause is before us on the respondent's exception to the decision of a justice of the superior court denying his motion to dismiss the appeal, affirm the decree and remand the case to the probate court for further proceedings.

We shall refer to Elizabeth M. O'Brien, a niece and heir of the decedent, as O'Brien and Michael F. Costello as Costello. We have considered some aspect of this cause in *Costello v. Probate Court*, R. I. , 204 A.2d 307, but it will serve no useful purpose to repeat here the facts therein.

It appears that Kathryn E. Conlon, another niece and heir of Ellen M. Darcey, the deceased, has contested the validity of her purported will and codicil in Massachusetts and the appointment of Costello thereunder; that the will and codicil were admitted to probate in Massachusetts and Costello was appointed executor; and that the supreme judicial court of that state affirmed the decree in those proceedings finding that the evidence supported the conclusions that the decedent was a domiciliary of Massachusetts at the time of her death, that she had testamentary capacity when the documents in question in question were executed, and that no undue influence was exercised over her by Costello. *Costello v. Conlon*, 344 Mass. 754.

O'Brien had constructive notice of these proceedings but never appeared and was never personally served.

The Pawtucket probate court ordered the authenticated copy of Darcey's will and codicil and the Massachusetts probate thereof to be filed and recorded in Rhode Island, appointed Costello executor in Rhode Island and denied O'Brien's petition for administration.

The instant controversy concerns one of two appeals prosecuted by O'Brien to the superior court from the decree of the

probate court of Pawtucket. The first contests the denial of her petition for administration and the second the filing and recording of Darcey's will and Costello's appointment. The causes came before a justice of the superior court on O'Brien's motions to consolidate her appeals and assigns them to the jury trial calendar and on Costello's motions to dismiss and remand. The petition for administration and motions pending thereunder were continued nisi until a final determination of this appeal in which the motion to assign was denied without prejudice. Costello's motion to dimsiss and remand was also denied and from this decision he prosecutes this bill of exceptions.

O'Brien has filed with this court a motion to dismiss Costello's bill of exceptions on the grounds it is premature and does not lie by virtue of G. L. 1956, §9-24-24. At the outset therefore we consider this question.

While it is generally the rule that in order to avoid "piecemeal" appeals we will not review exceptions to rulings until the case has been finally determined on the merits, it is equally well settled that the rule is otherwise when special and unusual circumstances are present which affect matters of public policy and interest. *Ewing v. Tax Assessors*, 90 R. I. 86; *Atlantic Refining Co. v. Director of Public Works*, R. I. , 200 A.2d 580. Costello asks that we dismiss the proceedings in the superior court because the federal constitution, art. IV, sec. 1, the full faith and credit clause, or in the alternative principles of comity, demand we give binding recognition to the Massachusetts decree affirmed in *Costello v. Conlon, supra.* In light of the facts before us, we are of the opinion that special circumstances are herein present which make these contentions of grave concern in the administration of our probate statutes. Therefore as a matter of public policy we shall consider them at this time.

O'Brien's motion to dismiss is denied.

We pass now to the merits. The main thrust of Costello's argument is that O'Brien's reasons of appeal filed in the superiod court do not raise any questions of law or fact triable in that court. He bases this argument on four points.

His first point is that O'Brien's appeal amounts to a plea nul tiel record as she does not deny the existence and recording

of the Massachusetts record on which Costello relies, but merely its binding effect on her. It appears to us that this contention requires some interpretation of our statute relative to the filing of foreign wills.

It is settled at common law that a will made and proved in one country must also be proved in a second in order to dispose of personal property there. *Olney v. Angell*, 5 R. I. 198. The manner of this proof is regulated in all states as in Rhode Island by probate statutes under which foreign wills and probates have no power to operate except so far as the statute accords them recognition. *Olney v. Angell, supra; Bowen v. Johnson*, 5 R. I. 112.

Our statute, G. L. 1956, §33-7-18, requires an executor or other interested person in a will which has been finally proved and allowed by another court to file an authenticated copy and the probate thereof in the probate court where a decedent had real of personal property. The court is then authorized to assign a time and place for hearing.

Under §33-7-19 notice of this hearing must "be given in the same manner as if said will was presented to such court for probate, *to the end that any person may appear and show cause why said copy should not be filed and recorded.*" (italics ours)

Read in pari materia with §33-7-18 and the cases decided thereunder which hold a foreign probate of a will of personalty is prima facie evidence only of its validity, it seems to us the legislature meant, in this section, to provide for a show cause hearing in the probate court aimed at the adducement of evidence going to the validity of a will as well as to the authenticity of its probate by a foreign tribunal. *Bowen v. Johnson, supra; Lapham v. Olney*, 5 R. I. 413.

By virtue of §33-23-1 a party aggrieved by a decision of the probate court has the right of appeal to the superior court. In effect, such an appeal removes a petition to the superior court for trial de novo upon all questions of law and fact and that probate decree is suspended excepting the grant of letters for the managing of a decedent's estate pending the appeal's outcome. G. L. 1956, §§33-23-2, 33-23-3; *Davis v. Higgins*, 59 R. I. 339; *Vaill v. McPhail*, 34 R. I. 361.

O'Brien's reasons of appeal filed in the superior court raise fact questions as to decedent's domicile, testamentary capacity, the factum of her will, and undue influence. As the decedent's next of kin and an interested person in the will, O'Brien was authorized, in the first instance, to litigate these questions in the probate court under §§33-7-18 and 33-7-19. We find nothing in the appeals section of the statute to prohibit their consideration on appeal and indeed are of the opinion that the very purpose of §§33-7-18 and 33-7-19 would be defeated if we were to hold otherwise.

Costello's first contention is without merit.

Secondly, Costello contends that the Massachusetts decree is res judicata on the issues O'Brien seeks to litigate here. In this connection he argues that said decree vested title to all decedent's personality, wherever located, in her executor and that in contemplation of law its situs is in Massachusetts, her domicile at death. Consequently, he urges there are no assets in Rhode Island over which the parties may litigate.

At best, the common-law unitary concept of a single situs for a decedent's personalty is one of limited utility for the purpose of acquiring jurisdiction in rem. *Hanson v. Denckla*, 357 U. S. 235. The expression that a probate decree is binding on all the world does not mean it is binding in a collateral proceeding as to facts found so far as persons who were strangers in interest are concerned. Hence, the binding effect of such a decree is limited to the assets within the rendering state but does not extend so as to conclude courts of another state as to the assets there. *Baker v. Baker, Eccles & Co.*, 242 U. S. 394; *Overby v. Gordon*, 177 U. S. 214; *Olney v. Angell*, 5 R. I. 198; *Bowen v. Johnson*, 5 R. I. 112. Consequently, the Massachusetts decree finding decedent Darcey was its domiciliary at her death could not in and of itself affect the title to or existence of assets in Rhode Island.

Furthermore, Costello argues that the principles of res judicata foreclose O'Brien from litigating here because she was a party to the Massachusetts proceedings and in privity with Kathryn E. Conlon.

So far as the assets in Massachusetts are concerned the judgment of probate was in rem; so far as it affects personalty beyond that state it acts in personam and binds only parties or

their privies. *Riley v. New York Trust Co.*, 315 U. S. 343; *Baker v. Baker, Eccles & Co., supra.* In the strict sense, a party to a judgment in personam is one who is named as such in the record and is properly served with process or enters an appearance. From the authenticated copy of the Massachusetts probate proceedings, it appears that O'Brien was served with a notice of pending probate hearing mailed to her in Rhode Island, but that she neither made an appearance nor was personally served.

In a larger sense parties may also include all persons who have a direct interest in the subject matter of the action and who have a right to control the proceedings and appeal if one lies. And it has been held that, if such a person has an interest which would be injuriously affected by the judgment and has notice of the action but refuses or neglects to appear and avail himself of these rights, he will be concluded by judgment although not named in the record as a party. 34 C. J. Judgments §1410, p. 992.

Conceding this may be a valid proposition as applied to suits by and against residents and domiciliaries within a given jurisdiction, we do not see how it can be applied so as to negate that elementary principle of jurisprudence that a court cannot acquire, by constructive notice, in personam jurisdiction over a nonresident. On this record, therefore, we hold O'Brien was not a party. *Pennoyer v. Neff*, 95 U. S. 714.

We turn now to the question of whether O'Brien is a privy of Kathryn E. Conlon. Costello argues that Conlon and O'Brien are in privity because they are both heirs to the same estate and therefore the latter is bound by litigation of the former in consequence of this "mutual" relationship.

The law of privity in the doctrine of res judicata concerns persons in their relation to property and not their relations to each other as to the same piece of property.

Classically defined, privies, whether in blood, in law, or in estate, occupy that relation to others because of derivative rather than mutual rights of property. 1 Freeman, Judgments (5th ed.) §438, p. 961; *Hart v. Moulton*, 104 Wis. 349. That is to say, only to the extent which one person has succeeded to an estate or interest formerly held by another can there be privity. Freeman, Judgments, *supra*, at p. 962. Consequently, the

cases indicate that there is no privity among heirs, distributees, legatees and devisees of an estate because they claim through and by the testator, but one another. *McIntosh v. Wiggins*, 354 Mo. 747, cert. denied 66 S. Ct. 1015; 50 C.J.S. Judgments §814, p. 364. Furthermore affinity or consanguinity does not create privity except when it results in the descent of an estate from one to another. *Riddle v. Cella*, 128 N.J. Eq. 4; *Trolan v. Rogers*, 88 Hun 422; 72 C.J.S. Privity; Privies; Privy at p. 961.

In our opinion, therefore, O'Brien's interest in the decedent's estate, whether as an heir under the will or as an heir-at-law, exists independently from that of Kathryn E. Conlon and there is no privity between them. Costello's contentions under this point are without merit.

We come now to his third point that under art. IV, sec. 1, of the United States constitution we are required to extend full faith and credit to the Massachusetts decree.

It is fundamental law that whenever a party seeks to enforce a foreign judgment in another state, the jurisdiction of the rendering court is open to inquiry and if it appears that the court has no jurisdiction the judgment is not entitled to full faith and credit. *Pennoyer v. Neff*, *supra*. This because "By the Constitutional provision for full faith and credit, the local doctrines of *res judicata*, speaking generally, become a part of national jurisprudence * * *." *Riley v. New York Trust Co.*, *supra*, at p. 349.

Since we have previously determined such jurisdiction is absent here this argument is also without merit.

Finally, we come to Costello's last point that aside from the question of full faith and credit, we should enforce the Massachusetts decree on principles of comity.

In the absence of legislative restriction, comity in the application of the laws of another state rests in sound judicial discretion dictated by the facts of the case. *Finney v. Guy*, 189 U. S. 335, 23 S. Ct. 558; *Edgerly v. Bush*, 81 N. Y. 199, 204.

Comity is not a positive rule of law but one of practicality based on a proper regard for the law of a foreign state. How far foreign laws should be enforced as a basis for jurisdiction depends on the law of the forum and this rests in turn on the forum's public policy with reference to its own institutions and the interests of its citizens. *Olney v. Angell*, *supra*, at p. 204.

We are not persuaded this record invokes any rule of comity. As far as O'Brien is concerned the Massachusetts decree is a nullity. In the circumstances, we believe that public policy prohibits us from supplying jurisdiction over one of our citizens for the purpose of binding her under a foreign decree when that jurisdiction is otherwise lacking. See *In re Armstrong's Estate*, 4 N.Y.S.2d 413.

Although not specifically referred to herein, we have considered Costello's remaining contentions and find them to be without merit.

O'Brien's motion to dismiss is denied, Costello's exception is overruled, the decision of the trial justice is affirmed, and the case is remanded to the superior court for further proceedings.

R. I.—, 216 A2d 694